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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of Secretary

In re)
)
Amendment of)
Section 73.202(b) of the)
Commission's Rules,)
Table of Allotments,)
FM Broadcast Stations)
(GLEN ROSE AND STAMFORD, TEXAS))

MM Docket No. 97-***
RM-****

To: The Chief, Allocations Branch,
Mass Media Bureau

SUPPLEMENT TO PETITION FOR RULE MAKING AND FOR
ISSUANCE OF ORDER TO SHOW CAUSE

Cleburne Radio, Inc. ("CRI"), the licensee of station KCLE-FM, Channel 221C2, Glen Rose, Texas, hereby supplements its March 6, 1997 "Petition for Rule Making and for Issuance of Order to Show Cause."

1. CRI's Petition seeks the upgrade of CRI's station KCLE-FM from Channel 221C2 to Channel 221C2. As the Petition makes clear, to accommodate the upgrade of KCLE-FM, the unbuilt construction permit for a new FM station at Stamford, Texas¹ must change both channel and transmitter site.

¹File No. BPH-951120MM. The FCC has not yet assigned called letters.

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2. As of March 6 (the day CRI filed its Petition), Blue Plains Broadcasting Company ("BPBC") held the Stamford construction permit. Also as of March 6, two applications were pending with regard to the unbuilt Stamford authorization:

- FCC Form 314 application BAPH-970204GE, which sought the Commission's consent to BPBC's assignment of the Stamford permit to M & M Broadcasting Company ("M & M")²; and
- FCC Form 301, File No. BMPH-970225IC, filed by BPBC to change the authorized transmitter site to one which would accommodate the upgrade of station KCLE-FM.

3. The FCC has since granted application BAPH-970204GE. M & M has acquired the construction permit and has notified the FCC of the assignment's consummation. See Exhibit A.

4. Modification application BMPH-970225IC is in the Audio Service Division's processing line. M & M, as successor-in-interest to BPBC, is prosecuting that application. M & M also makes evident in Exhibit B hereto its willingness to change the site and channel of the authorized but unbuilt facilities of the Stamford station to accommodate the upgrade of station KCLE-FM.

5. The Allocations Branch has not yet issued a Notice of Proposed Rule Making with respect to CRI's Petition. In conversations with the staff, it appears there is concern over whether the KCLE-FM upgrade proposal comports with the policy announced by the staff in

²As their respective FCC Form 323 Ownership Reports make evident, M & M and the petitioner here, CRI, are under common ownership and control.

Cut and Shoot, Texas, 11 FCC Rcd 16383 (M.M. Bur. 1996).³ The purpose of this Supplement is to demonstrate that the acceptance for rule making of CRI's Petition is consistent with a long line of controlling precedent, the latest two of which postdate Cut and Shoot. The allotment proposal that the Commission adopted in the most recent in that long line of cases, Farmersville, Texas et al., 12 FCC Rcd _____, DA 92-2210 (M.M. Bur., rel. Jan. 17, 1997), is indistinguishable from CRI's upgrade request on the issue at hand. Obviously, then (and assuming arguendo the validity of the Cut and Shoot decision), CRI's proposal does not conflict with Cut and Shoot.

6. The FCC does not hesitate to modify the authorization of either a built or an unbuilt FM broadcast facility to specify a different channel of the same class so as to accommodate a new or improved service elsewhere. The permittee's or licensee's consent is unnecessary and immaterial. The only requirement is that the rule-making proponent pledge to reimburse the displaced permittee or licensee. See, e.g., Clewistown, Florida, et al., 10 F.C.C. Rcd 6548, 6549 (M.M. Bur., 1995); Circleville, Ohio, 8 F.C.C. 2d 159 (1967).

7. But where a displaced facility must change transmitter site, the FCC requires evidence of the affected permittee's or licensee's consent to the move. Indeed, a lack of such

³In Cut and Shoot, the staff rejected a request to upgrade Station A where the upgrade would have been short spaced to Station B's licensed site, but that would have been fully spaced to the facilities authorized by station B's outstanding construction permit. The staff said that, while it may have processed such proposals in the past, it was concerned that processing the request could result issuing an upgrade decision that Station A might not be able to implement because there was no certainty that station B would end up constructing and obtaining a license for the facilities authorized in B's outstanding permit.

evidence is a fatal defect under binding precedent. See, e.g., Mt. Morris, Illinois et al., 4 FCC Rcd 5485 (M.M.Bur. 1989), recons. den., 5 FCC Rcd 1750 (M.M. Bur. 1990).

8. When presented with the required evidence of a third party's intent to change site, the FCC routinely accepts for rule making and grants requests for upgrades of the petitioners' stations. See, e.g. (among many other decisions), Farmersville, Texas et al., supra, at paras. 9⁴ and 10⁵; Colonial Heights, Tennessee, 12 FCC Rcd _____, DA 96-1483 (M.M. Bur., rel. December 10, 1996) at paras. 2⁶ and 13⁷; Earle, Arkansas et al., 12 FCC Rcd 8270 (M.M.

4"Hunt Broadcasting, [the upgrade proponent and] also the permittee of Station KAIH, has agreed to the new channel, a new transmitter site, and the modification of its construction permit [to accommodate the upgrade of its other station][footnote omitted; emphasis added]."

5"Cowboy Broadcasting, L.L.C. is the licensee of station KVMX, Channel 244A, Eastland, Texas. In order to accommodate a Channel 244C allotment at Flower Mound, we are substituting Channel 236A for Channel 244A at Eastland , we are substituting Channel 236A for Channel 244A at Eastland and are modifying the license of station KVMX to specify operation on Channel 236A [footnote omitted]. **Cowboy Broadcasting has agreed to this license modification and the new transmitter site [emphasis added]."**

6"**As a final accommodation, Murray [Communications, the permittee of Station WLJQ, Channel 290A, Colonial Heights, Tennessee] proposed a relocation of the transmitter site for station WAEY-FM, Channel 240A, Princeton, West Virginia [emphasis added]."**

7"**Channel 240C2 can be allotted to Colonial Heights, Tennessee at Station WLJQ(FM)'s transmitter site as specified in its construction permit [footnote omitted], and its authorization will be modified to specify the higher-class channel. In order to accommodate the Colonial Heights allotment, the following channels can be substituted at the respective communities: Channel 290A at Tazewell, [Tennessee,] Channel 231A at Morristown, [Tennessee,] and Channel 252A at Whitley City, [Kentucky,] each at the transmitter sites for Stations WCTU(FM), WMXK(FM), and WHAY(FM), respectively. Each of the licenses for the latter three stations will be modified to specify the new channel allotment. Additionally, to further**

Bur., 1995) at paras. 2⁸ and 3⁹; Jeffersontown et al., Kentucky, 9 FCC Rcd 6137 (M.M. Bur., 1994) at para. 4¹⁰; Charlotte Harbor, Florida et al., 9 FCC Rcd 5725 (M.M. Bur., 1994) at n. 5¹¹; Marina, California et al., 6 FCC Rcd 1491 (M.M. Bur. 1994) at para. 1.¹²

accommodate the Colonial Heights upgrade, the licensee for Station WAEY(FM) has agreed to relocate its transmitter to another site [footnote omitted; emphasis added]."

8"To accommodate [its] proposal, BPI requests the Commission to substitute Channel 234A for Channel 279A at Wilson, Arkansas The former permittee of the Wilson channel, Pollack Broadcasting Company (Pollack), has pending a petition for reconsideration of its construction permit [footnote omitted]. **However, [Pollack] states that, should the Commission grant its petition for reconsideration, it will seek consent to the channel substitution proposed by BPI and will seek to modify its construction permit to effect the required site and frequency changes [emphasis added]."**

9"Under [its] second alternative, BPI proposes the allotment of Channel 280C3 to Earle, instead of Channel 234C3. To accommodate this modification of Earle Broadcasting's proposal, BPI requests the Commission to substitute Channel 281A for Channel 280A at Pocohantas, Arkansas, and to modify the license for station KPOC-FM accordingly. **Without a subsequent change in transmitter site, station KPOC-FM would no longer meet the Commission's separation requirements. However, the licensee of the Pocohantas station, Scott Media Services (Scott), has consented to the channel substitution and site change, and BPI has agreed to reimburse Scott's reasonable and documented expenses it may incur in effecting the changes [footnote omitted; emphasis added]."**

10"**In recognition of the Commission's policy regarding the involuntary relocation of an authorized transmitter site, petitioners state that they have a joint agreement consenting to share the cost for change in the authorized transmitter site for Station WLSY(FM) at Jeffersontown and station WTHQ(FM) at Shelbyville, as well as the exchange of channels [emphasis added]."**

11"**In the joint counterproposal filed by Naples and Intermart, Naples has consented to a hypothetical relocation of its transmitter site in order to substitute Channel 255A for Channel 224A at Marco However, Naples would like to use its current transmitter site . . . for Channel 255A at Marco, utilizing § 73.215. Naples states that if it cannot utilize § 73.215 at its current transmitter site, it will file an application at**

9. Here, CRI's Petition pointed to BPBC's site-change application as indisputable evidence of BPBC's willingness to change transmitter site. CRI's Petition also pledged Circleville reimbursement to BPBC. Moreover, CRI's principals, through their own company M & M, have now acquired the Stamford construction permit from BPBC. Just as Hunt, in Farmersville, Texas et al., stated its willingness to physically move one of its stations to accommodate the upgrade of another of its stations, CRI's principals, through their other entity M & M, have stated their willingness to physically move the unbuilt Stamford construction permit to accommodate the upgrade of CRI's station KCLE-FM. See Exhibit B. The parallel is compelling, and similarly situated parties are entitled to similar treatment. Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965). Just as the

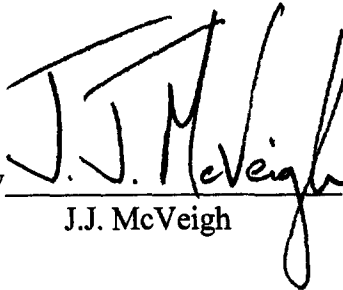
the hypothetical site and relocate its transmitter site in order to operate on Channel 255A as a 6 kilowatt station."

¹²The Salinas substitution would require station KRAY-FM to relocate its transmitter site to avoid a conflict with Station KBEE-FM, Channel 277B, Modesto, California [footnote omitted]. KRAY was agreed to do so, provided it is reimbursed for its reasonable costs associated with the frequency change and site relocation [footnote omitted; emphasis added]."

Commission accepted Hunt's upgrade proposal for rule making, it must accept CRI's Petition for Rule Making and should issue a Notice of Proposed Rule Making forthwith.¹³

Respectfully submitted,

CLEBURNE RADIO, INC.

By 
J.J. McVeigh

BERNSTEIN AND McVEIGH
1818 N Street Northwest, Suite 700
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(202) 296-1800

Date: April 17, 1997

¹³Because both CRI and M & M have stated their willingness to the modifications proposed in CRI's Petition, the issuance of Orders to Show Cause appear to be unnecessary. See, e.g., *Marina, California et al.*, 6 FCC Rcd at 1492, n. 2. Moreover, the record statement of M & M to do whatever is necessary to accommodate the KCLE-FM upgrade eliminates any question as to whether the Stamford facility will in fact move to facilitate the upgrade at Glen Rose. Thus, the concern expressed in *Cut and Shoot* is inapposite here.

EXHIBIT A

ANN BAVENDER*
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ERIC FISHMAN*
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ANDREW S. KERSTING*
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JAMES P. RILEY
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0420

April 7, 1997

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: New (FM) -- BPH-951120MM, Stamford, Texas
File No. BAP11-970204GE

Dear Mr. Caton:

Please be advised that the assignment of the above-noted permit from Blue Plains Broadcasting Company to M&M Broadcasting Co. was closed on April 4, 1997.

An ownership report is presently being prepared and will be filed with the Commission within the appropriate time period.

If additional information is necessary, please communicate with this office.

Very truly yours,


Vincent J. Curtis, Jr.
Counsel for M&M Broadcasting Co.

VJC:mah

cc: Gary Moss*

Anne Goodwin Crump, Esquire

*Please have a copy of this letter placed in the station's public inspection file.

EXHIBIT B

FACSIMILE TRANSMISSION FROM
J.J. AND L.G. McVEIGH
09 APR 97, 1822 UTC

STATEMENT OF CONSENT TO SITE AND CHANNEL CHANGE

THIS IS TO ADVISE THE COMMISSION THAT M & M BROADCASTING COMPANY, INC., THE ASSIGNEE OF THE UNBUILT CONSTRUCTION PERMIT FOR A NEW COMMERCIAL FM BROADCASTING STATION AT STAMFORD, TEXAS, IS WILLING TO CHANGE TRANSMITTER SITE AND AUTHORIZED CHANNEL TO ACCOMMODATE THE UPGRADE OF STATION KCLE-FM AT GLEN ROSE, TEXAS, FROM CHANNEL 221C2 TO CHANNEL 221C1, AS PROPOSED IN THE PENDING PETITION FOR RULE MAKING TO UPGRADE GLEN ROSE STATION KCLE-FM. M & M BROADCASTING COMPANY IS THE SUCCESSOR-IN-INTEREST TO THE FORMER PERMITTEE, BLUE PLAINS BROADCASTING COMPANY. M & M BROADCASTING COMPANY, INC. IS ALSO THE LICENSEE OF GLEN ROSE STATION KCLE-FM.

M & M BROADCASTING COMPANY, INC.

BY 

ITS PRESIDENT

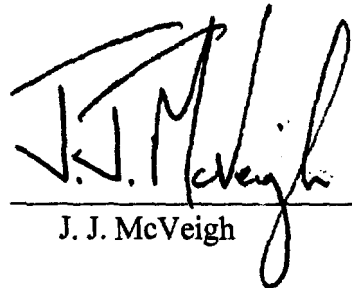
DATE: APRIL 9, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have this Seventeenth day of April, 1997, sent copies of the foregoing "Supplement to Petition for Rule Making and for Issuance of Order to Show Cause" by hand delivery to:

*Ms. Pamela Blumenthal
Allocations Branch, Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street Northwest
Washington, D.C. 20554

*Mr. John Karousos
Allocations Branch, Policy and Rules Division
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J. J. McVeigh